

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

D. Exceptions to Requirement of Expert Testimony

Insert the following text on the bottom of page 97:

For a good discussion of *res ipsa loquitur* and expert testimony in a medical malpractice action, see *Woodard v Custer*, ___ Mich ___ (2005) (“whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn’s leg is not within the common understanding of the jury, and, thus, expert testimony is required”).

CHAPTER 3

Civil Proceedings

Part III—Discovery (MCR Subchapter 2.300)

3.29 Independent Medical Examinations

A. Generally

Insert the following text on the bottom of page 191:

MCL 500.3151 of the no-fault act states that “[w]hen the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians.” MCR 2.311(A) allows the court to order independent medical examinations and place conditions on the examinations. In *Muci v State Farm Mutual Auto Ins Co*, ___ Mich App ___, ___ (2005), the Court of Appeals held that MCL 500.3151 does not conflict with MCR 2.311; therefore, a court in a no-fault action may order a person to undergo a medical examination pursuant to MCL 500.3151 and impose reasonable conditions upon the examination pursuant to MCR 2.311.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs — MCR 2.403(O)

5. Interest on Sanctions

On pages 203-204 replace the paragraph in this sub-subsection with the following text:

Interest on mediation* sanctions must be calculated from the date the complaint was filed. *Ayar v Foodland Distributors*, 472 Mich 713, 717-718 (2005). In *Ayar*, the Court applied the judgment interest statute, MCL 600.6013(8), to mediation sanctions ordered pursuant to MCR 2.403(O). MCL 600.6013(8) states that the interest calculation “on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint” The Court found that MCL 600.6013 expressly applies to “attorney fees and other costs,” and MCL 600.6013(8) does not make an exception for attorney fees and costs ordered as mediation sanctions pursuant to MCR 2.403(O). Therefore, interest on attorney fees and costs ordered pursuant to MCR 2.403(O) must be calculated from the time the complaint was filed.

*The case refers to “mediation” sanctions. However, the court rule was amended in 2000, changing “mediation” to “case evaluation.” *Ayar, supra* at 714 n 1.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

G. Peremptory Challenges

Delete the last sentence on page 214 and insert the following text on the top of page 215:

A prima facie showing of discrimination under *Batson* does not require a showing that peremptory challenges were more likely than not based on impermissible group bias. *Johnson v California*, 545 US ___, ___ (2005). The first step in a *Batson* challenge requires the opponent of the challenge to show that members of a cognizable racial group are being peremptorily removed. In *Johnson*, California required “at step one that ‘the objector [] show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.’” The Supreme Court found that California’s “‘more likely than not’ standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.” The Court held that “a defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”

Replace the sentence at the top of page 215 with the following language:

A trial judge may sua sponte raise a *Batson* issue to ensure the equal protection rights of individual jurors. *People v Bell*, ___ Mich ___, ___ (2005).

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

N. Standard of Review

Replace the third paragraph on page 216 with the following text:

In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *People v Knight*, ___ Mich ___, ___ (2005), the Michigan Supreme Court clarified the standards of review for each stage as follows:

“If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error.”

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text after the July 2005 update to page 283:

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

B. Plea Requirements

1. An Understanding Plea

On page 385, replace the paragraph immediately before “**2. A Voluntary Plea**” with the following text:

The court may, orally or in writing, advise one or more defendants at the same time of the guilty plea rights in MCR 6.302(B). If a writing is used to advise a defendant of his or her rights, the information must appear on a form approved by the State Court Administrator. MCR 6.302(B)(3).* “If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.” *Id.*

*Effective July 13, 2005.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Add the following language to the July 2005 update to pages 394-395:

Effective July 13, 2005, MCR 6.425 and MCR 6.625* were amended to comply with *Halbert v Michigan*, 545 US ____ (2005).

*Appeal from a misdemeanor case.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

2. Peremptory Challenges

Insert the following text after the first full paragraph on page 407:

A prima facie showing of discrimination under *Batson* does not require a showing that peremptory challenges were more likely than not based on impermissible group bias. *Johnson v California*, 545 US ___, ___ (2005). The first step in a *Batson* challenge requires the opponent of the challenge to show that members of a cognizable racial group are being peremptorily removed. In *Johnson*, California required “at step one that ‘the objector [] show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.’” The Supreme Court found that California’s “‘more likely than not’ standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.” The Court held that “a defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”

Replace the paragraph before the beginning of subsection (D) on page 407 with the following language:

A trial court may sua sponte raise a *Batson* issue to ensure the equal protection rights of individual jurors. *People v Bell*, ___ Mich ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

I. Standard of Review

Replace the last sentence of the second paragraph on page 409 with the following text:

In order to determine the proper standard of review of a trial court's *Batson* ruling, the appellate court must determine which step of the *Batson* challenge determination is being reviewed. In *People v Knight*, ___ Mich ___, ___ (2005), the Michigan Supreme Court clarified the standards of review for each stage as follows:

“If the first [*Batson*] step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error.”

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

A. Presentence Investigation Report (PSIR)

Insert the following text after the first sentence in the paragraph at the bottom of page 448:

A trial court must provide the prosecutor and the defendant's attorney, or the defendant if he or she is not represented by an attorney, with copies of the presentence report at a reasonable time before sentencing. MCR 6.425(B).*

*Effective July 13, 2005. Prior to that time, a court was not required to provide copies to the parties.

Insert the following text at the top of page 449 before the first full paragraph:

Proposed guidelines scoring must accompany the presentence report. MCR 6.425(D).*

*Effective July 13, 2005. In addition, courts are no longer required to complete a SIR form and return it to the State Court Administrator.

Insert the following text at the top of page 449 before the paragraph beginning, "Once a defendant challenges...":

MCR 6.425(E)(2)* states:

“(2) *Resolution of Challenges*. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

*Effective July 13, 2005. MCR 6.425(E)(2) was formerly MCR 6.425(D)(3).

“(a) correct or delete the challenged information in the report, whichever is appropriate, and

“(b) provide defendant’s lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.”

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Add the following text to the second paragraph on page 449:

If a trial court imposes a sentence that is not within the recommended guidelines range, the court must “articulate the substantial and compelling reasons justifying that specific departure[.]” MCR 6.425(E)(1)(e).*

*Effective July 13, 2005. The court need no longer commit its departure reasons to an SIR. See ADM 1988-4, as amended.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Insert the following text after the July 2005 update to page 455:

Immediately after imposing sentence on a defendant convicted by plea, the court must advise the defendant that if he or she is financially unable to retain an attorney, the defendant may request appointed counsel for purposes of appeal. MCR 6.425(F)(2)(b). * Requests for counsel made within 42 days after sentencing should be liberally granted. MCR 6.425(G)(1)(c).

*Effective July 13, 2005, MCR 6.425 was amended to comply with *Halbert v Michigan*, 545 US ____ (2005).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

D. Plea

Replace the first sentence on page 469 with the following:

The probationer may plead guilty to the violation. MCR 6.445.*

*Effective July
13, 2005.

E. Sentencing

Insert the following language after the July 2005 update to page 469:

Because the rule in *People v Hendrick*, 472 Mich 555 (2005), was clearly foreshadowed by the unambiguous language in MCL 771.4 and MCL 769.34(2), it applies retroactively. *People v Parker*, ___ Mich App ___, ___ (2005).

APPENDIX

Checklists, Scripts, Forms

Effective July 13, 2005, Administrative Order 2003-04 amended MCR 6.302, 6.425 and 6.445. The following scripts and checklists have been updated to reflect the rule changes:

- ♦ FELONY PLEA, Script/Checklist
- ♦ FELONY SENTENCING, Script/Checklist
- ♦ FELONY PROBATION VIOLATION – SENTENCING, Checklist

Replace the above-mentioned scripts/checklists with the following scripts/checklists.

FELONY PLEA

SCRIPT/CHECKLIST

MCL 768.35

MCR 6.302

SWEAR THE DEFENDANT.

Are you _____?

Is Mr./Ms. _____ your lawyer?

Have you had a full and complete opportunity to consult with your lawyer about this case before coming into court today?

(To the prosecutor): Is there a plea agreement?

(To the defense attorney): Is that the plea agreement? (Make sure also waive reading of Information, if plea at time of arraignment.)

(To the defendant): Did you hear and understand the plea agreement placed on the record by the lawyers?

Is this what you have agreed to do?

Do you ask that I accept the plea agreement?

(Address any Cobbs agreement. Confirm the sentence discussions were initiated by one of the parties, and identify the party. Confirm that the other party was present for the discussions or agreed that they could occur. Confirm the maximum sentence agreed to by the court based on the preliminary evaluation of the case. Confirm the defendant may withdraw the plea if the court decides to impose a sentence greater than that agreed upon.)

Are you presently on probation or parole? (If the answer is "yes", determine why and explain this may have an impact on the probation or parole status and may also affect the possible sentence. The prosecuting attorney has a duty to advise regarding consecutive sentencing.)

You are charged with _____ (describe the felony).

This felony carries a maximum possible sentence of _____. (Also state mandatory minimum sentence if required. Advise if offense is non-probationable.)

(Explain the plea agreement to the defendant. In possible probation cases, may want to explain the possibility of up to one year in the county jail as a condition of probation.)

(To the defendant): With all of this in mind how do you plea to the charge?

If your plea is accepted, you will not have a trial of any kind, and so you are giving up rights you would have had at a trial including these rights:

- To be tried by a jury;
- To be presumed innocent until proved guilty;
- To have the prosecutor prove beyond a reasonable doubt that you are guilty;
- To have the witnesses against you appear at the trial;
- To question the witnesses against you;
- To have the court order any witnesses you have for your defense to appear at the trial;
- To remain silent during the trial;
- To not have that silence used against you; and
- To testify at the trial if you want to testify.

Do you understand each of these rights?

Do you understand that if I accept your plea, you will be giving up every one of these rights?

[Option to above: If the court is using a written waiver form]

Have you read and do you understand the form explaining the rights you would have had at trial that you are giving up by pleading guilty (or no contest)?

Do you understand you are giving up every one of the rights described in that form if I accept your plea?

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and it would be up to them whether they would. Do you understand that?

There are some claims you will be giving up if I accept your plea. You will give up any claim that your plea was the result of promises or threats that I am not told about today and also give up any claim that it was not your own free choice to plead (guilty or no contest). Do you understand that?

Do you understand that I am not bound to follow the sentence disposition or recommendation agreed to by the prosecutor (unless I have agreed to it) and if I choose not to follow it, you will be allowed to withdraw from the plea agreement?

(For no contest plea) do you understand that for the purposes of sentencing, I will be treating you as though you were found guilty of this offense?

Other than what we have said in court today, has anyone promised you anything if you plea guilty (or no contest)?

Has anyone threatened you to get you to plea guilty (or no contest)?

Is it your own free choice to plea guilty (or no contest) to this offense(s)?

Are you pleading guilty because you are, in fact, guilty? (if guilty plea)

On or about _____ (date) in the _____ of _____, County of _____, did you _____ (elements of offense)? (or, for elements of the offense, have them describe what they did which leads them to believe they are guilty.)

No-contest plea. A no-contest plea requires the court's consent. If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must state why a plea of nolo contendere is appropriate; and hold a hearing which can be done at that time, to establish support for a finding that the defendant is guilty of the offense. Ordinarily the attorneys will stipulate to the use of the police report or the transcript of the preliminary examination. It may also be a good idea to obtain the defendant's consent to this process.]

Counsel, do you feel that the elements of the offense charged have been fully covered by the defendant's statement of the facts?

Counsel, are either of you aware of any promises, threats or inducements related to the defendant's plea other than those already disclosed on the record?

Counsel, has the court fully complied with subsections B through D of MCR 6.302?

(To the defendant): Once again, how do you wish to plea?

The court believes that the plea made is accurate, understanding and voluntary. The court is also satisfied there is a factual basis to support a finding that you are guilty of the offense(s) charged. Therefore, the court (choose one):

- a. Accepts the agreement without having considered the presentence report.
- b. Takes the plea agreement under advisement.
- c. Accepts the agreement after having considered the presentence report. (In which event the court must sentence the defendant to the sentence agreed to or recommended by the prosecutor.)
- d. Rejects the agreement.

(Address bond).

Sentencing in this case will take place on _____.

FELONY SENTENCING

SCRIPT/CHECKLIST

MCL 769.1 et seq

MCL 771.14

MCR 6.425(D), (E) and (F)

Are you _____? MCL 768.3.

Is _____ your attorney?

Do you realize you may be sent to prison for up to ____ years or fined up to ____ dollars or both?

Are you ready to be sentenced today?

Counsel, I have scored the sentencing guidelines in this case as _____. Are there any objections to that scoring? MCR 6.425(D). (Is it stipulated that the scoring is correct?)

(To defendant's attorney) Have you and your client read the presentence report? MCR 6.425(E)(1)(a).

(Ask defense attorney, defendant and prosecutor) Are there any corrections, additions or deletions to be made in the presentence report? MCR 6.425(E)(1)(b) and (2). Corrections are governed by MCL 771.14(5) and MCR 6.425(E)(1)(b) and (2). Direct presentence report be retyped if significant changes are made.

(Ask defense counsel if they have any comment regarding sentence). MCR 6.425(E)(1)(c).

(Ask defendant if he has any comments before sentence is imposed). MCR 6.425(E)(1)(c). (While the trial judge need not specifically ask the defendant if he/she has anything to say on his/her own behalf before sentencing, it is the author's view that a direct question to the defendant is the best course of action.) See People v. Petit, 466 Mich 624, 628 (2002).

Do the people wish to be heard? MCR 6.425(E)(1)(c).

(Give the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence). MCR 6.425(E)(1)(c).

(Make comments based upon the presentence report. MCR 6.425(E)(1)(d) and (e). State the reasons for the sentence: punishment, rehabilitation, protect society, deterrence People v Snow, 386 Mich 586 (1972); People v Coles, 417 Mich 523 (1983)).

(State if the sentence is within the sentencing guidelines. Advise the defendant if the sentence is a departure above the guidelines and that defendant can appeal the departure. Consider commenting that the sentence presumptively meets the test of proportionality, since it is within the guidelines. If the sentence imposed is not within the guideline range, articulate the reasons justifying that specific departure.) MCR 6.425(E)(1)(e).

(Impose sentence, following the presentence report, if using the recommendation). MCR 6.425(E)(1)(d).

(for prison sentence): "It is the sentence of the court that you, _____, shall be forthwith committed to the Michigan Department of Corrections for the purpose of classification and shall be confined in such state penal institution as shall be duly designated for a term of not less than ____ years (not more than 2/3 of maximum) and not to exceed ____ years (maximum sentence), from and including this date. You are committed (or remanded) to the custody of the sheriff."

Give credit for time in jail if appropriate, MCR 6.425(E)(1)(d). See MCL 750.195(2), and 768.7a and .7b for exceptions.

Cover whether sentence is concurrent or consecutive, MCL 769.1h. Sentences must be concurrent absent statutory authority for consecutive sentences. People v Sawyer, 410 Mich 531, 534 (1981).

Order full restitution as required. MCR 6.425(E)(1)(f), MCL 780.766(2).

Advise of rights. MCR 6.425(F).

(If conviction following a trial) You are entitled to appellate review of your conviction and sentence. If you are financially unable to retain a lawyer, the court will appoint a lawyer to represent you on appeal.

(If conviction following a plea) You have a right to ask the Court of Appeals to review this case and to ask for a lawyer for that purpose at public expense, if you cannot afford one. (If the sentence is over the guidelines) I have imposed a minimum sentence that is over the sentencing guidelines and you also have the right to ask the Court of Appeals to review that sentence and to ask for a lawyer for that purpose at public expense, if you cannot afford one.)

You are being given a form that can be used to request appellate counsel. You can use that form to request a lawyer. Your request for a lawyer must be made within 42 days after this sentencing. MCR 6.425(F)(1)(c).

Entertain motion by Prosecutor to dismiss other charges.

Cancel bond.

**FELONY PROBATION VIOLATION – SENTENCING
CHECKLIST
MCL 771.4
MCR 6.445**

Determine whether presentence report is required or waived. A prison sentence may not be imposed without a current presentence report.

If there is a presentence report, give the attorneys and the defendant an opportunity to challenge the information in it.

State the maximum possible sentence.

State the legislative sentencing guidelines, if they apply.

State the sentencing guidelines and indicate whether they apply.,, they are a starting point for the court. [The statutory sentencing guidelines apparently do not apply since the legislation does not say that they should be used.]

Give the defendant, counsel and the victim an opportunity to make a statement.

Continue, modify, extend or revoke probation and address any terms being deleted or added. If probation is revoked, impose sentence.

Give credit for time already served, whether jail or prison sentence.

Order restitution for attorney fees, if court-appointed counsel provided.

Advise of right to appeal if there was a contested hearing or if original conviction was by trial. Otherwise advise probationer is entitled to file an application for leave to appeal.

Explain right to counsel to request appeal.

